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Request from the Governments of Belgium, Finland, Hungary, Mexico, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations regarding the text prepared by the International Committee of the Red Cross on the mental element in the common law and civil law systems and on the concepts of mistake of fact and mistake of law in national and international law*

Note verbale received on 15 December 1999 from the Permanent Missions of Belgium, Finland, Hungary, Mexico, the Republic of Korea and South Africa to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretariat

The Permanent Missions of Belgium, Finland, Hungary, Mexico, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations present their compliments to the Codification Division of the Office of Legal Affairs of the United Nations and have the honour to attach the text of a paper prepared by the International Committee of the Red Cross (see annex) in order to assist the Preparatory Commission in drafting a text on the elements of crimes for the Court. The material in the paper relates to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law.

* The annex to the present document is issued in the language of submission only. Other language versions will be made available at a later date.

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The Permanent Missions of Belgium, Finland, Hungary, Mexico, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations request the circulation of the present note verbale and its annex as a document of the Preparatory Commission.

Annex

Paper prepared by the International Committee of the Red Cross relating to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law

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THE MENTAL ELEMENT IN THE COMMON LAW AND CIVIL LAW SYSTEMS

In all modern criminal law systems an actor must fulfil two elements to be held criminally responsible: (1) through his behaviour he must have caused a certain state of affairs forbidden by criminal law (*actus reus*); (2) he must have had a defined state of mind in relation to the causing of the event or state of affairs (*mens rea*). As to this last element, the concepts into which it is subdivided differ in the common law systems from those used in the civil law systems. The purpose of the present short paper is to shed some light on this point.

I. The Common Law Tradition

Both the English and United States Criminal Law and legal literature recognize three basic mental attitudes which are required for concluding that an actor must be held criminally responsible. They constitute the core of the overarching concept of *mens rea*.

1. Intention.

Many offences require proof of a specific intention to cause a particular result. Generally, intention exists where there is either

(i) the direct intention to bring about a desired result, i.e. the actor acts with the purpose to cause the result obtained.

Example: the specific or direct intention of an actor to bring about the death of another.

(ii) the intention to bring about a desired act, plus the foresight or knowledge that a certain result is at least highly probable as a consequence of his behaviour.

Example: the intention to cause serious bodily harm with the knowledge or foresight that it will result in death. In English law, the condition of foresight or knowledge exists when either a) the result is a necessary condition for the achievement of the purpose; or b) the result is known to be substantially certain to accompany the achievement of purpose.[1]

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[1] For English Law, see J. C. SMITH/ B. HOGAN, *Criminal Law*, 7. ed., London/Dublin/Edinburgh, 1992, pp. 53-59, 54: *"(1) A result is intended when it is the actor's purpose. (2) A court or jury may also infer that a result is intended, though it is not desired when (a) the result is a virtually certain consequence of the act, and (b) the actor knows that it is a virtually certain consequence"*. According to the Draft Criminal Code for England and Wales (Law Com. No. 177), 1989, cl. 18 (b): *"A person acts intentionally with respect to [...] result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events"* (*ibid.*, p. 55). The Law Commission for the Reform of Criminal Law (Law Com. No. 122), 1992, proposed the following definition: *"A person acts [...] intentionally with respect to a result when (i) it is his purpose to cause it; or (ii) although it is not his purpose that result, he is aware that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result"* (*ibid.*, p. 59).
In the United States, the Model Penal Code recognizes a similar distinction between purpose (direct intention) and acting with knowledge or foresight: see Sect. 2.02 (a) and (b). C.W. THOMAS/D.M. BISHOP, *Criminal Law*, Newbury Park / London, 1987, pp. 48-52.

2. Recklessness

As stated in (a) above, some crimes require the person intentionally or knowingly commit an act or an omission. Criminal liability may also be founded on a reckless act or omission, or by recklessly causing a specific result.

Recklessness,[2] generally, consists of the state of mind of a person who does not intend to cause a harmful result but takes an unjustifiable risk of which he is aware, thus causing an unlawful result.

In English law, recklessness is satisfied if either (i) he was aware of its existence, or (ii) in the case of obvious risk he failed to give it any thought. In some common law jurisdictions variations of this second component may also be termed "wilful blindness".

In the criminal law of the United States, to act recklessly, a person must be aware that his conduct creates a substantial risk of harm and nonetheless proceeds to act with a lack of concern regarding the danger. In the U.S.[3] recklessness is defined as the conduct of an actor who *"consciously disregards a substantial and unjustifiable risk of harm to persons and property"*. To meet the recklessness standard in the U.S., generally one considers the nature and purpose of the actor's conduct, the circumstances known to him, and, whether this involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation (M.P.C., Sect. 2. 02 (2) (c)).

The difference between intention and knowledge required for certain crimes, and liability based on recklessness, depends on the level of awareness that the conduct will cause a certain result. Both levels of *mens rea* are generally considered "subjective". In relation to criminal negligence, though not always consistent, the distinction between recklessness and criminal negligence is the lower mental standard required for negligence. That is, that the actor should have known of the substantial and unjustifiable risk of harm resulting from his conduct. The requirement that the actor "should" have known is generally referred to as an objective *mens rea* standard.

Recklessness does not require an actual resolve to harm, nor does it require knowledge at the time of the act that a particular harm is likely to result. Awareness that a particular harm might result is sufficient.

Example: A intends to cause bodily harm with an awareness of the risk of death, but nonetheless proceeds to act without regard to that potential danger.
In certain U.S. jurisdictions for example, the legislature has essentially deemed certain acts to involve recklessness; e.g. liability for recklessly endangering the life of another where knowingly pointing a loaded firearm at another, though with no intention to injure.

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[2] For English Law, see SMITH/ HOGAN, *op. cit.*, (*supra*, n. 1), pp. 60-69.
[3] THOMAS/ BISHOP, *op. cit.*, (*supra*, n. 2), p . 50.

3. Criminal Negligence

Criminal negligence[4] involves the inadvertent taking of an unjustifiable risk. Being unaware of the risk, one who acts negligently has neither any desire to do harm nor any expectation that harm might result.

The main difference with recklessness is the advertent nature of the risk-taking for recklessness. For recklessness, the actor generally must be consciously aware of the risk created, whereas for negligence the actor is wrongfully unaware of that risk. As it is the inadvertent conduct of that is criminalized, generally the *mens rea* element is an objective one. If the actor was unaware of the risk, but ought to have been aware, he was negligent.

Based on an objective standard, the conduct is criminalized because it constitutes a wanton disregard, or substantial departure from the standard of care that a reasonable person would observe in the situation.

The U.S. Model Penal Code defines criminal negligence as (i) a conduct representing *"a gross deviation from the standard of care that a reasonable person would observe in the actor's situation"*; (ii) the individual is unaware but *"should be aware of a substantial and unjustifiable risk"* (Sect. 2. 02 (2) (c))[5].

Example: Criminal negligence in the operation of a motor vehicle causing death. This would occur where the driving constitutes a substantial or marked departure from the standard of the ordinary person , where the actor should be aware that there is an unjustifiable risk in so doing.

II. The Civil Law Tradition

1. Criminal Law systems of the Civil Law tradition distinguish sharply between intention in the broad sense and negligence[6]. Negligence, however gross, does not carry criminal responsibility unless a particular crime provides for its punishment. Criminal negligence is defined as conscious or unconscious deviation from the required standard of care which causes a result prohibited by criminal law: this may happen (i) either because the actor wrongfully does not consider the results of his action (unconscious negligence), or (ii), if the actor envisaged that occurrence, because he wrongfully relied on the idea that the result would not occur (conscious negligence)[7]. The actor thus never intends, accepts or knows that the result will occur.

2. The *mens rea* qualifying for criminal responsibility is thus only that of intention in the broad sense, covering different sub-concepts to which we will immediately revert.[8] This intention in the broad sense covers all situations in which the actor acts both with will and knowledge of the underlying facts[9]. Both will and knowledge must be present in relation to all the elements of the *actus reus*. The three categories of this general intention are the

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4 For English Law, see SMITH/ HOGAN, *op. cit.*, (*supra*, n. 1), pp. 69-70, 92.

5 See THOMAS/ BISHOP, *op. cit.*, (*supra*, n. 2), p. 50.

6 For the whole area of the *mens rea* in civil law, see the particularly well-developed German legal writings, e.g. H. H. JESCHECK, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 3. ed., Berlin, 1982, pp. 232 *et seqs.*

7 *Ibid.*, p. 456.

8 The substantive conceptual approach described herein is essentially the same throughout civil law countries, although specific terminology may vary.

9 See e.g. Article 18 of the Swiss Penal Code: *"Celui-là commet intentionnellement un crime ou un délit, qui le commet avec conscience et volonté"*.

following[10].

a) Dolus directus

The concept of *dolus directus* consists basically of two variations which may be described as *dolus directus* first degree [Intention in the narrow sense, see below (i)] and *dolus directus* second degree[11] [see below (ii)].

(i) The actor has the purpose of bringing about the criminal result. It does not matter if this result is foreseen as being certain or only possible so long as the actor wants this result as it occurred. Will and knowledge apply to the same result, the will dominating.

Example: A hates B and wants to kill him. He shoots him with a revolver, B dies as a result of that act.

(ii) The actor foresees the criminal result as being certain or highly probable as a consequence of his acts. This result is not his (primary) purpose. It may be an undesired lateral consequence of the envisaged behaviour. But as the actor acts all the same he is deemed constructively to want also this lateral result. Will and knowledge do not apply equally to the same matter. Knowledge of the consequences dominates, the will is defective.

Example: A places a bomb on an ship because he intends to get the sum of money at which he insured some cargo loaded on board. He knows that persons will die, although this is not his motivation. If he acts all the same, he will be deemed to have wanted these killings also through the construction of *dolus directus*.

b) Dolus eventualis

The actor foresees the result as being reasonably probable or at least possible as the consequence of his acts, and simply accepts this event in the case it occurs. He does not desire the result, but condones it in the case it happens.

Example: A drives a car in a village at an excessive speed. He may think that he might cause damage. If he internally accepts this eventuality, even if he does not care if it occurs or not, then for the purposes of the law he is deemed to have desired the result. He is thus punishable.

If the actor does not accept this result but wrongfully believes that it will not happen, he is only (grossly) negligent and may, according to the crime, not be punishable.

Example: In the case produced above, the driver may envisage the harmful result, but wrongfully think that the danger will not materialise, e.g. because he is an excellent driver, accustomed to rally-driving. In such a case, not having eventually accepted the result, he is only consciously negligent.

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[10] See JESCHECK, *op. cit.*, (*supra*, n. 8), pp. 238-240.

[11] In some civil law countries this concept is called "dolus indirectus".

III. Conclusion: A Brief Comparison Between the Two Legal Systems

Notwithstanding the different architecture of the criminal systems and the ensuing differences between the operative concepts, it can be asserted that for the question of *mens rea* there is a substantial overlap of the notions. From the preceding analysis it can be seen that intention under common law corresponds to *dolus directus* in the first or second degree in the civil law[12]. Recklessness covers both *dolus eventualis* and some cases of gross negligence under civil law. As to this last point, there is a difference in the reach of punishable attitudes. In civil law, the cases of inadvertent recklessness fall under the heading of negligence. As negligent behaviour they are not punishable unless a specific offence criminalizes such conduct. In the common law systems generally, inadvertent conduct is criminalized in certain circumstances as criminal negligence. Finally, the concepts of negligence are substantially analogous.

It may thus be concluded that the differences between the two systems in our context are real, but more conceptual than substantive.

[12] See *supra*, II. 2. a): (i) and (ii).

THE CONCEPTS OF MISTAKE OF FACT AND MISTAKE OF LAW IN NATIONAL AND INTERNATIONAL LAW

I. Municipal Law

1. In both common and civil law criminal law systems **knowledge of facts** underlying the *actus reus* is an essential element for criminal liability.

In the common law systems[13], mistake of fact is recognised as a defence. Thus, in English law, as stated in the *Morgan* case (English Court of Appeals)[14] it was held that a mistake of fact is a defence where it prevents the actor from having the *mens rea* required. Where the law requires intention or recklessness with respect to some element in the *actus reus*, a mistake, whether reasonable or not, will excuse. Where the law requires only negligence, then only a reasonable mistake can afford a defence since an unreasonable mistake is itself a negligent act. What can be added is that common law did not elaborate a general theory on the defence of mistake of fact. Thus the question turns to a large degree upon the particular characteristics and requirements of each crime.

In the civil law systems the *mens rea* of the actor must be present in relation to all the elements of the *actus reus*. Error of fact is thus considered to be a circumstance extinguishing any intention to commit the crime under consideration[15]. It follows that the actor cannot be punished for crimes which carry criminal liability only in the case of intentional commission[16]. On the other hand the actor remains punishable for negligence if (i) he could and should have avoided the error by displaying the care to be reasonably expected and if (ii) the crime provides for punishment also in the case of negligence[17].

It can be seen that the defence of error of fact has a more general standing in the civil law systems. Its reach may thus also be larger on the substantive level.

2. In both common and civil law criminal systems **ignorance of the law** is treated differently from ignorance of facts (even if the line between both may be difficult to draw in a specific case). It is a good defence in criminal law only under exceptional circumstances.

In the common law systems, ignorance of the law is generally held to be no defence to criminal liability[18]. This rule applies very strictly in English law. It has been held by English courts that even if it was quite impossible for the actor to know of the prohibition of law, this was no defence for him. The same is true in case of competent legal advice which was held

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13 See e.g. J.C. SMITH/B. HOGAN, Criminal Law, 7. ed., London/Dublin/Edinburgh, 1992, pp. 215-218.

14 *Ibid.*, pp. 215-6.

15 See e.g. Article 19 of the Swiss Criminal Code. See also P. NOLL/S. TRECHSEL, *Schweizerisches Strafrecht, Allgemeiner Teil*, I, 2. ed., Zurich, 1986, pp. 96-100. H.H. JESCHECK, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 3. ed., Berlin, 1978, pp. 245 *et seq.*

16 Intention covers in this context action done with a purpose to reach the criminal result, *dolus directus* and *dolus eventualis*. On these concepts, see the Paper "The Subjective Criminal Element in the Common Law and in the Civil Law Systems".

17 See e.g. Article 19 (2) of the Swiss Criminal Code. Cf. NOLL/TRECHSEL, *op. cit.*, (*supra*, n. 3), p. 97. JESCHECK, *op. cit.*, (*supra*, n. 3), p. 248.

18 SMITH/HOGAN, *op. cit.*, (*supra*, n. 1), pp. 80-83. In Grant v. Borg (2 All. ER., p. 263), Lord Bridge said that *"the principle that ignorance of the law is no defence in crime is so fundamental that to construe the word 'knowingly' in a criminal statute as requiring not merely knowledge of facts material to the offender's mind, but also knowledge of the relevant law, would be revolutionary, and, to my mind, wholly unacceptable"*.

not to be available as a defence. There are exceptions to this rule only if the *actus reus* of a particular crime is so defined as to contemplate mistake of law, excluding it from the sphere of criminal guilt[19].

In the civil law systems, the actor incurs criminal liability only if (i) his acts correspond objectively to the behaviour prohibited by a particular crime, (ii) are illegal, and (iii) are also culpable, *i.e.* the actor has some individual fault in performing them. It must be possible to reproach the acts to the individual who committed them[20]. Such a fault, necessary for conviction, can be excluded in a particular case because of a relevant error or ignorance of law[21]. The general rule of the civil law systems is the same as that known to common law. It is expressed in the old rule of law that ignorance of the law is always at one's own risk (*ignorantia iuris nocet*)[22]. Because of the condition of imputation of individual fault, the civil law systems recognised more generously some exceptions. They all have in common that the actor acts without being aware of his fault. For example, in the jurisprudence of the Swiss Federal Court, the following reasons have been recognised as a good defence: (1) wrong legal advice by officials; (2) previous acquittal by a court of law for the same behaviour; (3) a long illegal practice never challenged before; (4) completely unclear laws; (5) absence of any doubt as to the legality of the acts because of the particular circumstances and personality of the actor[23].

As can be seen, the civil law systems grant the actor a larger degree of benefit for the subjective contingencies which may have obscured his awareness of acting against the law.

II. International Criminal Law

1. International Criminal Law follows to a large extent the principles developed under municipal law. The Nuremberg and Tokyo Trials may be said to have already settled the law on these points.

2. As to **ignorance of facts**, the several war crimes tribunals following World War II have been at pains to demonstrate that each accused convicted had individually knowledge of the facts underlying his crime[24]. If no knowledge or no sufficient knowledge could be proved, the

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[19] SMITH/HOGAN, *op. cit.*, (*supra*, n. 1), pp. 83-85.

[20] See NOLL/TRECHSEL, *op. cit.*, (*supra*, n. 3), pp. 127 *et seq.*; JESCHECK, *op. cit.*, (*supra*, n. 3), pp. 363 *et seq.*

[21] See e.g. Article 20 of the Swiss Criminal Code. See also NOLL/TRECHSEL, *op. cit.*, (*supra*, n. 3), pp. 140-144; JESCHECK, *op. cit.*, (*supra*, n. 3), pp. 368-372.

[22] See already the Gloss '*Qui sciens' ad Codex Justinianus*, 2, 11, (12), 15.

[23] As to this last point the Federal Court (in: *Arrêts du tribunal fédéral*, vol. 104, sect. IV, pp. 221 *et seq.* had to deal with the Trial of a 19 years old Sicilian living for five years in Switzerland, who had had sexual intercourse with his 15-years old Sicilian girl-friend. It was held that for the accused the only crime he knew of would have been to have such intercourse without marrying the girl. This was in fact his intention. The age-limit of 16 years was absolutely unknown to him because of his particular cultural roots.

[24] See e.g. the *K. Brandt (The Medical) Trial*, in: *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. II, Washington (without date), pp. 194-5, 201-2, 206, 209, 224, 226, 237, 239, 256-7, 260-2, 266, 271, 279, 284, 295-6. *J. Altstötter (The Justice) Trial*, *ibid.*, vol. III, Washington, 1950, pp. 1079-81 (generally), pp. 1084, 1093-4, 1099, 1129, 1142-4, 1176. *O. Ohlendorf Trial*, *ibid.*, vol. IV, Washington, 1950, pp. 543, 550, 570-1, 577, 580. *O. Pohl Trial*, *ibid.*, vol. V, Washington, 1950, pp. 978-80 (generally), pp. 984, 989, 995, 1007, 1009, 1017, 1020-2, 1031-1, 1033, 1036, 1039, 1043-6, 1049-50. *I.G. Farben Trial*, *ibid.*, vol. VIII, Washington, 1952, pp. 1155-6, 1159-60, 1162-3, 1165, 1167, 1169, 1189, 1193, 1195. See also the *Von Leeb (The High Command) Trial*, *ibid.*, vol. XI, Washington, 1950, pp. 553 *et seq.* and the *W. List Trial*, *ibid.*, vol. XI, Washington, 1950, pp. 1262 *et seq.*

accused was acquitted[25]. Even if knowledge could be proved but there was no sufficient proof of the defendants criminal connection with the deeds, the defendant was acquitted[26]. Sometimes the tribunals insisted that the accused 'must have known' or 'could not have ignored' the facts[27]. This should not be seen as a constructive imputation of inexistent knowledge, but as a question of proof. The tribunal was satisfied in those cases that due to the circumstances the defendant knew of the facts. Thus the question is one of indirect proof.

The question of error as to facts arose in several contexts and was solved by the tribunals by carefully scrutinising the state of mind of the accused and the credibility of the defence with regard to surrounding circumstances. It was examined, e.g. in the context of (1) executioners who thought that the executions which they carried out were legal, *i.e.* founded on a lawful death sentence[28]; (2) the shooting of prisoners of war who were thought to be trying to escape[29]; (3) a mistake as to the status of persons being (escaped) prisoners of war[30]; (4) *bona fide* mistakes as to the existence of the conditions of other defences, e.g. military necessity[31]. The question arose most frequently as to the duties of military commanders to control their troops: did those commanders know of the (widespread) crimes committed in the area under their command? The tribunals uphold a quite strict duty of the commanders in these cases[32].

It can be seen that ignorance of fact is a defence in international criminal law, but that the conditions of its application are strict. This can be easily explained from the context. It was difficult to maintain that the major war criminals appearing before the various post-World War II courts had lacked knowledge of certain quite manifest and widespread facts.

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[25] See e.g. *K. Brandt (The Medical) Trial*, *ibid.*, vol. II, Washington (without date), pp. 218, 227, 249, 251. *O. Pohl Trial*, *ibid.*, vol. V, Washington, 1950, p. 1009, 1017. *I.G. Farben Trial*, *ibid.*, vol. VIII, Washington, 1952, pp. 1163-4, 1165, 1193, 1195.

[26] See e.g. *K. Brandt (The Medical) Trial*, *ibid.*, vol. II, Washington (without date), pp. 250-1, 276. *O. Pohl Trial*, *ibid.*, vol. V, Washington, 1950, p. 1002. *E. Milch Trial*, *ibid.*, vol. II, Washington, (without date), p. 814, per Judge Musmanno.

[27] *J. Alstötter (The Justice) Trial*, *ibid.*, vol. III, Washington, 1950, pp. 1106, 1116-7 (ignorance *"overtaxes the credulity of this tribunal"*; *"could hardly have escaped the attention of [...]"*). *O. Pohl Trial*, *ibid.*, vol. V, Washington, 1950, p. 1055 (*"it was his duty to know"*). *Von Leeb (The High Command) Trial*, *ibid.*, vol. XI, Washington, 1950, p. 538. *W. List Trial*, *ibid.*, vol. XI, Washington, 1950, p. 1281.

[28] United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals*, vol. V, London, 1948, pp. 79-80 (in the context of the *T. Hisakasu Trial*).

[29] The defence was generally denied on the facts of the case. See the synthesis of the Nuremberg case law in: *Law Reports...* (*supra*, n. 16), vol. XV, London, 1949, pp. 186-7.

[30] *Stalag Luft III* case, *Law Reports...* (*supra*, n. 16), p. XI, London, 1949, pp. 31 *et seqs.*, pp. 35, 39, 44. What was pleaded was a mistake of fact, i.e. that the accused did not realise that the persons looked for were escaped prisoners of war but thought that they were spies or saboteurs. The tribunal denied such a mistake on the facts of the case.

[31] *A. Krupp Trial*, *Law Reports...* (*supra*, n. 16), vol. X, London, 1949, p. 148.

[32] The standard was described in the *W. List Trial*, *Law Reports...* (*supra*, n. 16), vol. VIII, London, 1949, p. 70: *"An army commander will not ordinarily be permitted to deny knowledge of reports at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein [...]"*. See also the *Yamashita Trial*, *ibid.*, vol. IV, London, 1948, pp. 3-4, 30, 33, 35 (judgment); *S. Kou* case, *Y. Sakamoto* case, *Y. Tachibana* case (*ibid.*, p. 86); *K. Meyer Trial*, *ibid.*, pp. 100, 108. *B. Masao Trial*, *ibid.*, vol. XI, London, 1949, pp. 56-61. *E. Shimichi* and *A. Hatzao* cases, *ibid.*, pp. 59-60. *Von Leeb Trial*, *ibid.*, vol. XII, London, 1949, pp. 76-7. The *Tokyo Trial*, in: B. V. A. ROELING/C. F. RUETER (eds.), *The Tokyo Judgment*, Amsterdam, 1977, pp. 30-1.

3. **Ignorance of law** is a distinct type of defence which is admitted only in even more exceptional circumstances. This holds true because the defendant is not presumed to know the facts (as to this proof must be administered), but is presumed to know the law. No legal system could rest on the opposite presumption. Thus the post-World War II tribunals never scrutinised the knowledge of law for each accused as they did for the knowledge of facts. They exceptionally raised the point in case the accused manifestly or purportedly was under the influence of such an error, which, if excusable, led to his acquittal[33]. The principle was stated in the *Flick Trial*: *"[The accused] must be expected to ascertain and keep within the applicable law. Ignorance thereof will not excuse guilt but may mitigate punishment"*[34]. According to the general principle *ignorantia iuris neminem excusat* the standard of proof was held to be high. In particular, it was held not being able to be discharged for crimes that offend the elementary bonds of human decency and which must thus be known to be illegal to anyone (*mala per se*)[35]. On the other hand, exceptions were made in certain cases of vagueness or uncertainty of the law[36]. In the *Von Leeb (The High Command) Trial*, it was said that the accused cannot be held criminally responsible for a mere error in judgement as to disputable legal questions, that he cannot be expected to draw fine distinctions and conclusions as to the legality of superior orders[37]. In the *Latza* case, a Norwegian tribunal held that the accused had believed that national law was binding on him and therefore admitted that the accused had acted, in that particular circumstances, under an excusable misapprehension of the law[38].

The question of mistake as to illegality was often pleaded in the context of illegal commands. If this illegality was not apparent, there could have been absence of *mens rea* to commit a crime. The accused cannot be held to draw fine legal distinctions[39]. In the *Almelo* case, the Judge Advocate said that the test was the belief of a reasonable man[40]. But if the accused had specific legal knowledge, the tribunals applied much higher standards[41]. The question of absence of *mens rea* as to such illegal commands merges largely into the broader one of superior's orders which is not to be considered here.

From the foregoing it may be concluded that ignorance of the law was accepted as an excuse in very exceptional cases where the individual could not be confronted with a reproach of personal guilt. Some of the cases, e.g. on the obscurity or vagueness of the law, use categories known to municipal jurisprudence.

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33 See e.g. the *J. Altstötter (The Justice) Trial*, *Trials*... (*supra*, n. 12), vol. III, Washington, 1950, p. 1138 (knowledge of the violation of international law). *I.G. Farben Trial*, *Trials*... (*supra*, n. 12), vol. VIII, Washington, 1952, pp. 1157-1160.

34 *Law Reports*... (*supra*, n. 16), vol. IX, London, 1949, p. 23. See also the *Buck Trial*, *ibid.*, vol. V, London, 1948, p. 44.

35 *Von Weizsäcker (The Ministries) Trial*, *Trials*... (*supra*, n. 12), vol. XIV, Washington, 1952, p. 339: *"[The accused] cannot be heard to say that he did not know the acts in question were not criminal. Measures which result in murder, ill-treatment, enslavement, and other inhumane acts perpetrated on prisoners of war, deportation, extermination, enslavement, and persecution on political racial, and religious grounds, and plunder and spoliation of public and private property are acts which shock the conscience of every decent man. These are crimes* per se*"*.

36 See generally *Law Reports*... (*supra*, n. 16), vol. XV, London, 1949, pp. 183-186.

37 *Ibid.*, vol. XII, London, 1949, pp. 73-4.

38 *Law Reports*... (*supra*, n. 16), vol. XIV, London, 1949, p. 69. The tribunal found to that effect also because international law was held to be uncertain on the point at issue (*ibid.*, pp. 59-60).

39 See above, footnote 25.

40 *Law Reports*... (*supra*, n. 16), vol. I, London, 1947, p. 41.

41 See e.g. The *J. Buhler Trial*, *Law Reports*... (*supra*, n. 16), vol. XIV, London, 1949, p. 38 and the *W. Von Leeb Trial*, *ibid.*, vol. XII, London, 1949, pp. 116-7.

III. Conclusion

The subjective element of *mens rea* has some role also in the law of defence pleas, especially in the cases of mistake as to the relevant incriminated facts or as to the applicable law. The knowledge of facts must be shown by the ordinary standards of proof. There is no presumption as to such knowledge. The ordinary rule on proofs in criminal cases may apply: *in dubio pro reo*, in case of doubt for the accused. It is thus on the prosecution to show that the accused knew (or could not have ignored) the relevant facts. When one speaks of error or ignorance as a defence, it is generally an error or an ignorance of fact which is meant; for only an error of fact is a general defence.

On the contrary, ignorance of law is only a very exceptional defence as no criminal law could perform its functions under a broad exception of this kind. The objective of promoting essential social peace could not be reached. Moreover the individuals would be incited not to take cognisance of the law. Knowledge of the law must thus not be proved, but is presumed. Such knowledge of the law may be presumed with particular justification in such areas of the law as criminal law, dealing ordinarily with the socially most grave deviations from lawful conduct. It is then to the accused to show that in the particular circumstances and his specific situation he ignored the law for good reasons. Jurisprudence has worked out some categories where the defence holds good. If the accused does not discharge this heavy burden of proof, he cannot avoid conviction: *in dubio contra reum*, in case of doubt against the accused. All this shows the exceptional character of the defence of error of law in criminal cases.